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**THE RIGHTS OF BIRTH PARENTS  
AND ADOPTIVE PARENTS AND THE  
BEST INTERESTS OF CHILDREN:  
A LOOK AT ADOPTION SERVICES IN  
MONTANA**

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December 1990

Prepared by



**Montana Legislative Council**

Montana Legislative Council  
State Capitol, Room 138  
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**THE RIGHTS OF BIRTH PARENTS  
AND ADOPTIVE PARENTS AND  
THE BEST INTERESTS OF CHILDREN:  
A LOOK AT ADOPTION SERVICES IN MONTANA**

A Report to the 52nd Legislature  
from the  
Legislative Council

As Required by  
House Joint Resolution No. 48  
51st Legislature

Prepared by Valencia Lane, Staff Attorney

Montana Legislative Council  
Room 138, State Capitol  
Helena, MT 59620

December 1990



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Valencia Lane, Staff Attorney

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HOUSE JOINT RESOLUTION NO. 48

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM COMMITTEE TO STUDY THE IMPLICATIONS OF THE COMMISSION FOR HUMAN RIGHTS' RULING IN WHEELER V. MONTANA DEPARTMENT OF FAMILY SERVICES REGARDING PUBLIC AND PRIVATE ADOPTION SERVICES IN THE STATE; AND REQUIRING THAT THE COMMITTEE REPORT ITS FINDINGS TO THE 52ND LEGISLATURE.

WHEREAS, in 1988, the Commission for Human Rights ruled in Wheeler v. Montana Department of Family Services that the Department had violated Title 49, chapters 2 and 3, MCA, commonly known as the Human Rights Act and the Governmental Code of Fair Practices, with regard to the denial of adoption services on the basis of age, marital status, and religion; and

WHEREAS, as a result of this ruling, the Department of Family Services no longer provides adoption services for infants under 1 year of age; and

WHEREAS, private adoption agencies in the state filed amicus briefs in the case on behalf of the Department; and

WHEREAS, these private agencies are concerned that the Wheeler ruling will be applied to their adoption services; and

WHEREAS, it is in the best interests of prospective adoptive parents and adoptive children that all questions of law be settled so that adoption services by the state and private agencies may be readily available.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to:

- (1) examine current adoption policies and practices of the Department of Family Services;
- (2) evaluate existing laws in other states and court cases in other jurisdictions pertaining to the adoption of children, especially infants;

(3) determine whether the Department is entitled to exemptions from the Human Rights Act and the Governmental Code of Fair Practices with regard to use in adoptions of such considerations as age, marital status, or religion;

(4) evaluate the rights of birth parents with respect to the choice of adoptive parents; and

(5) evaluate the effects of the Wheeler ruling on private adoption agencies.

BE IT FURTHER RESOLVED, that the interim committee report its findings to the 52nd Legislature and present options for legislative consideration if the committee determines that options are necessary.

## I. INTRODUCTION

On October 17, 1988, the Commission for Human Rights issued its Findings of Fact, Conclusions of Law, and Final Order (hereinafter referred to as the Order) in the case of Wheeler v. Montana Department of Family Services.

In 1989, the 51st Montana Legislature passed House Joint Resolution No. 48, a measure to study the implications of the Wheeler ruling on public and private adoption services in the state and to require a report of the findings to the 52nd Legislature. Duties specifically mandated by HJR 48 are to:

- (1) examine current adoption policies and practices of the Department of Family Services;
- (2) evaluate existing laws in other states and court cases in other jurisdictions pertaining to the adoption of children, especially infants;
- (3) determine whether the Department is entitled to exemptions from the Human Rights Act and the Governmental Code of Fair Practices with regard to use in adoptions of such considerations as age, marital status, or religion;
- (4) evaluate the rights of birth parents with respect to the choice of adoptive parents; and
- (5) evaluate the effects of the Wheeler ruling on private adoption agencies.

The resolution was introduced on April 11, 1989, signed by the Speaker of the House and President of the Senate on April 26, 1989, and filed with the Secretary of State on April 27, 1989. The completion of the 1989-90 interim study poll to determine funding and staffing of interim committees was delayed several months because of the interruption caused by the June

1989 Special Session of the Legislature. On August 26, 1989, the Legislative Council reviewed the interim studies proposed by resolutions and bills passed in regular and special session and selected those studies to be conducted before the convening of the 52nd Legislature in January 1991. Studies based on two Senate joint resolutions and two House bills from the 1989 regular session and one Senate bill and two House bills from the 1989 special session were selected to be conducted during the interim. House Joint Resolution No. 48 was not selected for study. However, at its September 1989 meeting, the Legislative Council endorsed a proposal that Legislative Council staff prepare a legal/research report concerning the issues raised in HJR 48 and make the report available to the 52nd Legislature and other interested persons.

The report study was assigned to staff of the Legal Services Division. Because of time constraints imposed on staff by regular interim duties and the additional duties imposed by the May 1990 Special Session, it was determined that the report would include a study of all items specified by HJR 48, with the exception of the evaluation of adoption laws and court cases of other states. It was determined that information regarding other states' laws would be included in the report only to the extent that such information becomes available during the course of the study.

Staff contacted parties interested in the study, including personnel of private adoption agencies, the Commission for Human Rights, the Department of Family Services, and the attorney who represented the complainants in the Wheeler case. In the absence of the appointment of an interim legislative committee, staff chose the following procedure in order to conduct the study:

- (1) review the current status of adoption statutes and case law in Montana and review applicable provisions of the Montana Constitution;

- (2) review the Wheeler ruling, including the legal briefs and memorandums filed with the Commission during the case, the hearing transcript, and the final Order;
- (3) analyze the effects of the Wheeler decision on public and private adoption policies and procedures and consider whether Title 49, chapter 2, MCA (generally known as the Human Rights Act), and Title 49, chapter 3, MCA (generally known as the Governmental Code of Fair Practices), should be amended to provide exemptions for adoption practices, taking into consideration applicable constitutional provisions;
- (4) review available information on the subject of adoption, including the Child Welfare League of America's Standards for Adoption Service,<sup>1</sup> the Adoption Factbook,<sup>2</sup> published by the National Committee for Adoption, and Adoption Law and Practice;<sup>3</sup>
- (5) become familiar with the current issues regarding adoption in Montana through discussions and meetings with interested persons;
- (6) monitor the Governor's report and recommendations regarding the future of the Department and any effect the recommendations may have on adoption policies and practices of the Department and, by implication, on private agencies; and
- (7) write a report that includes a discussion of the issues, findings and conclusions, and proposals for statutory changes, if any, including drafts of bills necessary to enact the proposals.

This report summarizes the study conducted by staff, using the above study plan. The report addresses only the voluntary placement of infants for adoption and does not consider the particular requirements of the federal Indian Child Welfare Act of 1978.

Many individuals and organizations assisted staff during the study. Appreciation is extended to all those who attended and participated in meetings and discussed the issues with staff. In particular, staff wishes to thank the following for their assistance and cooperation:

- Montana Department of Family Services
- Montana Commission for Human Rights
- Montana Interagency Council on Adoption
- Catholic Social Services for Montana
- Crittenton Home
- LDS Social Services of Montana
- Lutheran Social Services of Montana
- Montana Children's Home and Hospital (Shodair)
- Montana Intercountry Adoption, Inc.
- Montana Post Adoptive Center

## II. CURRENT STATUS OF ADOPTION SERVICES IN MONTANA

### A. BACKGROUND

#### 1. CURRENT ADOPTION POLICIES AND PROCEDURES

The treatise, Adoption Law and Practice,<sup>4</sup> provides a helpful discussion of the types of adoption as defined by the method of placement. In order to help the reader distinguish between agency and nonagency placements, relevant parts of the discussion are produced below:

##### [a] Agency Placements for Adoption

All states permit placements by state agencies, and by private agencies licensed by the state. Many of these private agencies are denominational or sectarian. Some have special purposes, such as finding adoptive homes for children with special needs.

In a typical voluntary surrender of a child to an agency, the biological parent or parents relinquish all parental rights to the agency, including the right to place the child for adoption, after they have been counseled by agency personnel about all their options and have had the legal consequences of their surrender explained to them. Frequently, if the parents are unwed, the birth mother will have had some contact with the agency prior to the birth of her child. She may tentatively plan to relinquish the child once she gives birth, but she will have to reaffirm her intentions after the child's birth. . . .

In most states, the child will remain in the custody of the agency until the rights of both the birth mother and father are terminated. In some states the agency will place the child with prospective adopters after the mother's relinquishment but prior to the termination of the father's rights. The birth mother may have the right to withdraw her own consent if the birth father appears and contests the relinquishment or the adoption. In choosing an adoptive couple, the agency may or may not permit the birth parents to participate in the choice. . . .

Those who seek to adopt a healthy newborn from an agency often face an arduous, lengthy and, ultimately, a potentially unsuccessful process. Applicants to adoption agencies are likely to encounter complex selection procedures, waiting periods of five to eight years, substantial fees for the agency's services, especially if the agency is a private one, and no assurance that they will ever receive a child. Agencies typically have requirements relating to the marital status of applicants, as well as to their ages, religion, financial means, physical and mental health, and general standing within the community. In the past some agencies required applicants to present proof of their infertility. While ostensibly relevant to the applicants' fitness as adoptive parents, all of these factors have not been

shown to have any precise correlation with parental fitness and may instead function as ways of reducing the number of applicants to a more manageable level. These criteria will often discourage people from applying to agencies in the first instance, even more than the apparent lack of adoptable newborns or the prospect of not being able to take custody of a child immediately after birth.

#### [b] Direct Private Placements for Adoption

Many childless adults, frustrated with the complexity and length of adoption agency procedures, or fearful that their personal characteristics will render them ineligible for agency assistance, attempt to adopt independently. In fact, they are much more likely to end up with an adoptable infant through a non-agency private placement. The overwhelming majority of healthy infants are adopted through private placements.

It is not only the greater availability of babies that draws prospective adoptive parents to non-agency private adoptions. By receiving an infant directly from the birth mother soon after the birth, and, as happens in some cases, by being present at the birth, childless adults may vicariously experience childbirth. They feel the child is "theirs," and has not been processed by bureaucrats, or detained in foster care. Many such adoptive parents are also pleased to replace what they believe is the false security of anonymity that remains characteristic of most agency placements with the genuine security of knowing, or at least knowing about, the birth parents. Although they will have to endure a post-placement investigation of their "suitability" for adoption, and will have to formalize the adoption in a court proceeding, these couples are nonetheless able to minimize the scope of public intrusions of their privacy. . . .

Direct private adoptions begin with the voluntary action of at least one biological parent who has decided to release parental rights of a child to some other adult. This may be a stepparent with whom the child is already living, other relatives or a specific unrelated couple or single adult whom the birth parent has selected personally, possibly with the advice of a third party.

In addition to permitting direct, non-agency placements of children when a stepparent adoption is contemplated, all states permit parents to place their child directly for adoption with close relatives other than stepparents. Moreover, all but eight states allow parents acting either directly, or with the assistance of an unlicensed intermediary, to place their children with unrelated prospective adopters. In the eight states which do not allow such placement, only licensed public or private agencies are authorized to place children for adoption by non-relatives. Even in these states, however, it may be possible for parents to arrange for the agency to place the child with someone selected by the parents, or to get a judicial or administrative waiver of the agency-placement requirement, if they can show that a waiver [is] in the best interests of the child.



Some states permit a third party intermediary to assist a parent in locating prospective adopters and in arranging for the actual physical placement of the child. Other states, such as California and New York, allow private placements, but prohibit unlicensed intermediaries, including lawyers, from engaging in child-placing activities. In these states, however, as well as in other states with similar prohibitions, it is considered appropriate for lawyers representing prospective adopters to advise them on how to locate a child, and for lawyers representing birth parents to advise them on how to evaluate prospective adopters. . . .

In response to concerns about the unsupervised placement of children with "strangers," a small but increasing number of states now require that prior to the physical transfer of the child to an unrelated person, notice of the intended placement must be given to a designated state agency, or to a court, and a pre-placement home study of the prospective adopters must be approved. The ABA Draft Model Act similarly provides for preplacement reports.<sup>5</sup> (citations omitted)

Discussions with representatives of the Department of Family Services and private agencies indicate that the above descriptions typify adoption practices in Montana today. Nonagency placements are commonly used in Montana. Many birth mothers who might once have placed their infants through an agency now place their children through direct nonagency placements. According to Department and private agency representatives, unwed birth mothers are often contacted by persons interested in adopting their infants.<sup>6</sup> Consequently, Montana agencies, both public and private, operate in an environment in which a birth mother who is considering placing her infant for adoption is able to choose the type of placement with which she is most comfortable. The incentives to place through a direct nonagency placement include the opportunity to help select the adoptive parents. The effect of the Wheeler ruling is to make it more difficult for the Department to operate in the current adoption environment. This difficulty extends indirectly to the private agencies that place infants of birth mothers referred by the Department.

## **2. THE RULING OF THE COMMISSION FOR HUMAN RIGHTS IN WHEELER V. MONTANA DEPARTMENT OF FAMILY SERVICES**

The Wheeler ruling involved a contested case before the Commission for Human Rights in which the charging parties, the Wheelers, alleged that the Department of Family Services had violated the Human Rights Act and the Governmental Code of Fair Practices with respect to adoption services. The Wheelers adopted one infant through the Department. When after several years they were not successful in adopting a second infant, they brought a complaint before the Commission, alleging that the Department had illegally discriminated against them on the basis of age, marital status, religion, and retaliation. The retaliation charge was based on the fact that the Wheelers had brought an earlier charge before the Commission, alleging that the Department had discriminated against them on the basis of age and marital status. The earlier complaint was resolved by settlement agreement. The Commission ruled against the Wheelers on the retaliation issue, but on the other issues, it ruled that the Department had impermissibly used the factors of age, marital status, and religion to deny the Wheelers an adoption placement. The Commission ruled that the Human Rights Act and the Governmental Code of Fair Practices prohibit the Department from discriminating in adoption services based on a prospective adoptive parent's age, marital status, or religion.

The Commission's orders in the Wheeler case may be summarized as follows:

- (1) The Department may not elicit information concerning the religious beliefs or affiliations of prospective adoptive parents (in any phase of the adoption process).
- (2) The Department shall refer to a private adoption agency any birth parent whose sincere religious beliefs require placement with a family of a particular religion.

- (3) The Department may not consider age and marital status of prospective adoptive parents except as those factors may affect initial eligibility for adoption (as opposed to the decision to place a particular child in a particular home, in which case the prohibited factors cannot be considered either by the Department or the relinquishing parent).
- (4) The Department may not disseminate to placement workers, birth parents, or any other persons any information concerning the age or marital status of prospective adoptive parents.
- (5) If the Department denies an application for adoption based upon the applicant's age or marital status, the Department shall notify the applicant in writing of the decision with a statement of the reasons for the decision.
- (6) The Department shall establish a procedure for counseling birth parents who state unsolicited preferences for adoptive parents based upon age, marital status, or religion. This procedure must include an explanation of why the Department cannot honor the preferences and must provide information about private adoption agencies.
- (7) The Department shall revise its rules and procedures to comply with the requirements of the Order and file any proposed rule or policy involving considerations of age, marital status, or religion in the adoption process with the Commission staff and allow them the opportunity for comment.
- (8) The Department shall expedite and facilitate the placement of an infant with the Wheelers, without consideration, specific or implied, of their ages, religion, or marital status.

## **B. ANALYSIS OF WHEELER RULING**

### **1. DISCUSSION**

The ruling of Commission for Human Rights draws several distinctions that must be considered and understood in order to adequately analyze the ruling and to propose options addressing the ruling's effects. The most important distinctions are:

- between adoption services provided by the state agency and those provided by private adoption agencies;
- between two phases of the adoption process--the determination of initial eligibility for adoption versus the decision to place a particular child in a particular home; and
- between discrimination based on religious grounds as opposed to discrimination based on age and marital status.

There is an important distinction that was not addressed in the Wheeler ruling but that cannot be disregarded when considering the current status of adoption law--the distinction between those adoption practices and procedures followed in traditional, agency placements and those followed in direct nonagency placements that are commonly made today. Montana law allows placement through the Department of Family Services, a licensed agency, or by the birth parents.

These distinctions and their significance are discussed below.

#### **(a) State agency versus private agency services**

The Commission's ruling addresses only those adoption services provided by the state. The fact that the Department licenses private agencies was raised during the Wheeler case, and the Commission was urged by the charging

parties to eliminate use of any of the proscribed criteria by private adoption agencies licensed under the Department's jurisdiction.<sup>7</sup> The Commission's preliminary order included private agencies. The Department filed formal exceptions to the inclusion of private agencies on the basis that the practices of private agencies were not at issue in the case. The Order was amended to delete references to private adoption agencies licensed by the Department. Thus, while the Wheeler ruling directly affects only the practices and procedures of the Department, the question of whether similar limitations apply to private agencies has been raised. Not only was the question raised during the Wheeler proceedings, but following the issuance of the Order, the Administrator of the Commission sent the Department a letter suggesting that the Department seek a declaratory ruling from the Commission concerning the Department's licensing of private adoption agencies that use discriminatory criteria as factors in placement.<sup>8</sup> The letter also included a statement of the Administrator's opinion that an argument can be made that the Department should not license either private adoption agencies that deny placements based on age or marital status or private nonreligious agencies that use religion as a placement criteria.

Although the Commission staff urged the Department to seek a declaratory ruling on the issue of private agencies licensed by the Department, the Department has apparently not pursued that course. At this time, absent the filing of a future complaint directly challenging the use of the prohibited criteria by private agencies, the Commission's Order does not directly prevent private agencies from using the prohibited criteria as factors in placement. However, as discussed below, the private agencies have been indirectly affected by the ruling nonetheless. Therefore, any options that may be proposed for addressing the effects of the ruling should address the distinction drawn between the state and the private agencies. Proposed options may specifically exclude or include private agencies in the procedures applied to the Department. At the very least, options should be proposed with the knowledge that:

- (1) it has been argued that the Department must eliminate the use of any of the proscribed criteria by private adoption agencies licensed under its jurisdiction; and
- (2) procedures applied to the Department may also indirectly affect private agencies even though the procedures are not directly addressed to them.

**(b) Determining initial eligibility versus selection of adoptive parent**

The ruling recognizes two distinct phases of the adoption process: the determination of initial eligibility for adoption versus the decision to place a particular child in a particular home. Under the ruling, the Department is not allowed to use arbitrary standards that fix age limits or marital status restrictions at any stage of the adoption process. However, the Department may consider age and marital status in making adoption eligibility determinations (in the stage in which applicants are approved as adoptive parents) to the extent that age or marital status of an applicant for adoption of a child may be relevant to determination of parenting ability, security for a child, or familial stability.<sup>9</sup> The Order forbids the Department from disseminating information regarding age or marital status to placement workers, birth parents of children placed for adoption, or others. The distinction drawn by the Commission is puzzling in that it acknowledges the importance and significance of age and marital status in adoption proceedings but forbids their use in the final placement stage. The distinction is apparently explained by the Commission's belief that once a natural parent (usually a birth mother) has decided to place a child for adoption, she voluntarily relinquishes any constitutional right to determine her child's upbringing from that point on. The Commission's ruling states, at page 14, that: "The constitutional right of the birth mother to determine her child's upbringing terminates when she voluntarily relinquishes that right by placing her child for adoption."<sup>10</sup> This belief is apparently pivotal to the entire ruling. Otherwise, there could be no distinction between the two

stages of the adoption process and no way to justify use of obviously relevant and important information, the use of which the Commission has determined is prohibited under the Human Rights Act and the Governmental Code of Fair Practices. Without a specific exemption for adoption proceedings, which does not appear in those statutes and which the Commission could not imply, there is no other way to justify consideration of these important factors and still prohibit disparate treatment of prospective parents based on these factors.

This distinction, and the belief on which it is based, served a useful purpose in the Commission's ruling and conforms to traditional agency placement adoption practices and procedures. However, the distinction does not conform to direct nonagency placement adoption practices and procedures that are commonly used today. The effect of the Wheeler ruling is to restrict the Department to traditional agency placement practices and procedures (and indirectly private agencies as well) and to deny the Department the opportunity to operate effectively in the environment in which adoptions take place today. The effects of the ruling will be preserved unless the Legislature acts to amend state law to allow consideration of certain factors, such as age, marital status, and religion, in placement decisions without distinction between the two phases of the adoption process.

Montana law provides for direct nonagency placement for adoption by a child's parents. Section 40-8-108, MCA, provides that:

- A child may be placed for adoption only by:
- (1) the department;
  - (2) a licensed child placing agency; or
  - (3) the child's parents.

Montana law further provides that after a final decree of adoption is entered, the birth parents have no rights over the adopted child (40-8-125, MCA). See also In re C.P., 221 Mont. 180, 717 P.2d 1093 (1986). Once parental rights are terminated, either by an order terminating parental rights (such as

in a case of abuse or neglect) or by a final decree of adoption, then a birth parent's constitutional right to determine the child's upbringing terminates. However, it is not clear under Montana law that a birth mother voluntarily relinquishes that right by placing her child for adoption—at least not before the final decree of adoption is entered. In other words, it is not necessarily true that a birth mother who chooses to place her child for adoption must be denied the opportunity to participate in the selection of the adoptive parents. In fact, the two statutes cited above recognize the birth mother's right to place the child for adoption (without distinction between the two stages of adoption) and that those rights do not terminate at the time the decision to place for adoption is made but rather at the time the adoption is finalized. Section 40-8-109, MCA, provides for procedures to be followed when a birth parent places a child with a particular individual, further recognizing that a birth parent has the right to select the adoptive parents. The Wheeler ruling does not address the fact that the effect of the ruling is to deny a birth mother who places her child through an agency (either through the Department or through a private agency) the rights available under state law to a birth mother who chooses to place her child through a direct nonagency placement.

While the distinction between the determination of initial eligibility to adopt and the selection of specific adoptive parents is useful in traditional, agency placements, the distinction is not useful in, or characteristic of, direct nonagency placements. While the Department operates as a traditional agency service provider, it must be recognized that the Department operates in an environment in which direct nonagency placements are readily available. Requiring the Department to adhere to the distinction and to prevent birth mothers from using the prohibited criteria in the selection of adoptive parents hinders the Department in effectively providing adoptive services. It also fails to promote a state policy of preventing discrimination on these factors because birth mothers can avoid the restrictions by choosing to place their infants through direct nonagency placements. Public policy of preventing discrimination is not served and neither is the critical



issue in adoptions--the best interests of the child. In fact, it can be argued that public interest would be served by adoption practices and procedures that allow a birth mother to participate in the selection of adoptive parents. Birth mothers would not be discouraged from using the professional services provided by agencies and would have less incentive to place their infants through unregulated direct nonagency placements. Also, it is felt that allowing a birth mother to participate in the selection of adoptive parents helps her to achieve closure after the adoption.<sup>11</sup> For these reasons, it is recommended that the Human Rights Act and the Governmental Code of Fair Practices be amended to allow the best interests of the child to be paramount in adoption proceedings, including the nonarbitrary consideration of relevant and important information, such as age, marital status, and religion.

**(c) Religion treated differently from age and marital status -- constitutional concerns**

**(i) Treatment in Wheeler case**

Religion is treated differently from age and marital status in the Commission's ruling. The Commission's Order states as a finding of fact that the age of a prospective adoptive parent has no relation to his or her qualifications to rear an infant child, except as may be considered in conjunction with other factors, such as health, earning capacity, provisions for the support of a child, or other relevant circumstance.<sup>12</sup> The Commission further finds that the marital status of a prospective adoptive parent has no relation to his or her qualifications to adopt an infant child, except as it may relate to his or her stability to serve as a parent in particularized circumstances.<sup>13</sup> With respect to religion, the Commission finds that the religious identification of a prospective adoptive parent has no intrinsic relation to his or her qualifications to adopt an infant child--without exception.<sup>14</sup> The Order does not explain these findings, but it does refer, at p. 41, to the constitutional prohibition against discrimination on the basis of religion.

The Commission's Order allows the Department to use the factors of age and marital status in its initial determination regarding applicants' eligibility to be adoptive parents. These factors may not be used arbitrarily but may be considered to the extent that they are relevant to a determination of parenting ability, security for a child, or familial stability. The Department may not share the age or marital status information with placement workers, natural parents of children placed for adoption, or others. Once a couple has been approved as an adoptive couple, the Department may not use the factors of age and marital status in further determinations regarding placement of a particular child.<sup>15</sup>

While the Department is allowed to consider the factors of age and marital status to a certain degree, the Department is not allowed to use the factor of religious beliefs to any extent. The Order provides that the Department may not elicit information regarding the religious beliefs or affiliations of prospective adoptive parents or utilize any information regarding such beliefs in any decision in the placement of infants for adoption.<sup>16</sup>

## **(ii) Discussion**

Discrimination is prohibited by both statute and constitution in Montana. Discrimination based on both age and religion, but not marital status, is prohibited by the general statute prohibiting discrimination, section 49-1-102, MCA. Discrimination based on age, marital status, and religion is prohibited in both the Human Rights Act (49-2-308) and the Governmental Code of Fair Practices Act (49-3-205). Neither age nor marital status discrimination is specifically prohibited by the state constitution. However, age is addressed in the constitution by Article II, sections 14 and 15, which grant adult rights to persons 18 years of age and older. The state constitution specifically prohibits discrimination based on religion. Article II, section 4, of the state constitution provides that:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any

person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Article II, section 5, of the state constitution provides that:

The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Although discrimination on the basis of age and marital status is not specifically prohibited by the constitution, the general provision of equal protection applies. Disparate treatment based on any of these factors may be permissible but must withstand constitutional scrutiny applied by the courts.

For purposes of this study, the distinction based on constitutional grounds between information pertaining to religion and information pertaining to age and marital status is of special significance. For practical purposes, the Legislature can change statutory provisions as long as the constitution is not violated. Therefore, it would be possible to amend the statutes to allow consideration of marital status, and perhaps age, in adoption proceedings if this is determined to be desirable. However, the amendment could not violate the constitutional provision regarding equal protection. An amendment to allow the use of religion as an eligibility or selection criterion may also be permissible but would require special consideration because of the specific constitutional protection granted to religious beliefs. To be valid, such a statutory amendment could not violate the constitutional prohibition against discrimination based on religious beliefs or otherwise deny equal protection. Careful consideration must be given not only to the rights of prospective adoptive parents but also to the rights of private sectarian adoption agencies.

In equal protection analysis, there are three types of court review:

- (1) rational basis review of classifications not based on either fundamental rights or constitutionally protected rights;
- (2) middle tier review of classifications based on constitutionally protected rights; and
- (3) strict scrutiny review of classifications based on fundamental rights.

If a classification is based on a right that is not fundamental or constitutionally based, rational basis will apply. That is, a classification that is rationally related to a governmental objective is not prohibited by the constitution. Marital status falls into this category, allowing a statutory change to allow consideration of this factor in adoption proceedings and, consequently, disparate treatment based on this factor if there is a rational basis for so doing.

A classification involving a constitutionally protected benefit is subject to a two-pronged, middle tier analysis that asks:

- (1) whether the classification is reasonable; and
- (2) whether the state's interest is more important than the classified group's interest.

Butte Community Union v. Lewis, 229 Mont. 212, 745 P.2d 1128 (1987) (welfare); Deaconess Medical Center of Billings v. Social and Rehabilitation Services, 222 Mont. 127, 720 P.2d 1165 (1986) (income limits in medical assistance); and State ex rel Bartmess, 223 Mont. 269, 726 P.2d 801 (1986) (educational aspects of extracurricular activities -- 2.0 case).

Fundamental rights, those found in the Declaration of Rights (Article II of the Montana Constitution) or a right without which other constitutionally

guaranteed rights would have little meaning, are subject to a strict scrutiny/compelling state interest analysis. Because freedom of religion is a fundamental right, and one that is guaranteed by both the state and federal constitutions, a classification based on religious beliefs would be subject to a strict scrutiny analysis and would be illegal unless there were a compelling state interest to be supported by the classification.

Because age is constitutionally recognized in the provisions granting adult rights, it can be argued that age falls into the middle tier or strict scrutiny review. The Montana Supreme Court has not definitively decided this issue. In one criminal case, the Court held that age was subject only to the rational basis test. In re Wood, 236 Mont. 118, 768 P.2d 1370, 46 St. Rep. 228 (1989). However, the same result may not be found in an adoption case since the holding in Wood was premised on extending adult rights to a juvenile.

Another aspect to be considered in relation to the constitutionality of classifications is whether only the state is restricted by the constitutional provision or whether the restriction applies to private agencies as well. As written, the constitutional provision relating to equal protection and prohibition against discrimination appears to apply to private actors as well as to the state. However, the provision has not been interpreted this way. It has been interpreted to mean that discrimination is not illegal absent state action. In re the Trust Created Under the Will of Cram, 186 Mont. 37, 606 P.2d 145 (1980); Ham v. Holy Rosary Hosp., 165 Mont. 369, 529 P.2d 361 (1974). In addition, there seems to be at least some question of whether prohibiting a private, sectarian agency from placing children only with a parent who adheres to the agency's own religious affiliation would violate the agency's freedom of religion. However, it has been held in at least one case that such religious-based restrictions by a private, sectarian adoption agency are unconstitutional. Scott v. Family Ministries, 65 Cal. App.3d 492, 135 Cal. Rptr. 430 (1976).

It is not clear under Montana's constitutional provision, as it has been interpreted, whether the adoption policies and procedures of a private adoption agency would be considered private action or state action. Even private agency adoptions and direct nonagency placements eventually involve state judicial proceedings that constitute state action: for example, the termination of the parent-child relationship between the natural parents and the child, the establishment of a parent-child relationship between the child and the adoptive parents, and the sanction of state licensure of private agencies. At least one recent case has held that a private adoption agency and the child's mother who placed the child for adoption became state actors to the extent that their actions had brought a state statute involving the biological father's rights into play. Swayne v. L.D.S. Social Services, 670 F. Supp. 1537 (D. Utah 1987).

#### (d) Other considerations

The Wheeler ruling addressed only the classifications of age, marital status, and religion. However, the Human Rights Act and the Governmental Code of Fair Practices also prohibit discrimination by the state based upon race, creed, color, physical or mental handicap, and national origin. The state constitution also prohibits discrimination based on race, color, sex, culture, social origin or condition, or political ideas. It is reasonable to assume that under the Wheeler decision, the consideration of these factors in adoption services provided by the state would also be prohibited.

## 2. CONCLUSIONS

In its final ruling in the Wheeler case, the Commission distinguished between state agency adoptions and private agency adoptions. Although the Order does not specifically apply to private adoption agencies, it has been argued that the Department must eliminate the use of any of the proscribed criteria by private adoption agencies licensed under the Department's jurisdiction. There is legitimate concern on the part of the private adoption agencies that

there may be an attempt in the future to apply the limitations found in the Wheeler ruling to private agencies.

In its Wheeler ruling, the Commission made a convenient distinction between two phases of the adoption process--determining initial eligibility versus selection of adoptive parents. This distinction allowed the Commission to condone the use of age and marital status, which it found to be relevant factors, in one phase but to disqualify the use of these factors in the second phase. This distinction was necessary because without the distinction, the use of these two factors could not have been found permissible at all under the statutory prohibitions. However, this distinction seems artificial, with its sole purpose to provide a way around the barrier of the statutory prohibitions.

The Commission's ruling also ignores the distinction between agency placements (state or private) and direct nonagency placements. This distinction, although perhaps necessary under the statutory prohibitions, does not promote public policy. Discrimination is not avoided since birth parents can place their infants through direct nonagency placements, avoiding the limitations of the ruling. In a sense, the ruling has the effect of encouraging direct nonagency placements, which are unregulated.

Classifications based on marital status (and perhaps on age) fall into the rational basis test. Consideration of these factors in adoption procedures is permissible, by either the state or private agencies, as long as there is a rational basis for the classifications. The ruling acknowledges the relevance of the appropriate use of age and marital status information in adoption proceedings. Therefore, it is recommended that the state statutory laws be changed to focus on the best interests of the child, to allow the appropriate, nonarbitrary use of age and marital status in state adoption proceedings, and to allow a state agency to operate in a manner so that direct nonagency placements are not encouraged. It is not anticipated that the amendment would allow arbitrary use of age and marital status, such as barring

adoptions by single people or by anyone over a certain age. It is intended only that the placing agency can use information relating to age and marital status as one factor to be considered in determining the best interests of the child. Such a statutory change will promote the best interests of the child through regulated agency placements rather than unregulated direct nonagency placements. The amendment should specifically allow the use of age and marital status information by both the state and private adoption agencies licensed by the state in determining the best interests of the child. It could even be argued that this could pass middle tier or strict scrutiny review, based on a guardianship concept.

The use of religion as a factor in adoption proceedings must be addressed separately. Religious beliefs are a fundamental right, and the state cannot classify people on this basis without a compelling state interest. It is not clear whether private agencies could legally use such a classification or not. While the state constitutional provision has not generally been applied to private actors in cases not involving adoption, there is precedent in other states that private agencies are state actors. In addition, there is a concern that agencies under religious auspices should be free to stipulate requirements consistent with their faith and practices and that of their clients as long as constitutional guarantees and protections are met. A number of states have statutes that address religious factors in adoptive placements. Typically, they require that a child be placed with adoptive parents of the same religion as the biological parent when practicable.<sup>17</sup>

The Commission found that religion is irrelevant to the adoption process. It is doubtful that a statute that discriminated against adoptive parents on the basis of one religion over another or that favored believers over nonbelievers would be constitutional. However, some consideration of religion in the adoption process may be appropriate, particularly if a birth parent expresses a desire to place an infant with a family of a particular religious faith. It seems appropriate that religion should be one factor, among others, that should be considered in determining the best interests of the child. It is a



recommendation of this study that the statutory laws should be changed to allow religious information to be considered by state and private adoption agencies in adoption proceedings in a nonarbitrary manner. This recommendation is made with the realization that there are constitutional concerns regarding the use of religion as a factor in adoption proceedings. Such a statutory change will promote the best interests of the child through regulated agency placements rather than unregulated direct nonagency placements. The amendment should specifically allow the use of such information both by the state and by private adoption agencies licensed by the state in determining the best interests of the child.

In conclusion, adoption policies and laws in this state should be changed to make the best interests of the child the paramount concern. It is recommended that the state adopt a policy similar to the following statement by the Child Welfare League of America regarding the purpose of adoption services:

The primary purpose of adoption service is to help children who would not otherwise have a nurturing family of their own to become members of a family that can give them the care, protection, and opportunities essential for their healthy personal growth and development.

The placement of children for adoption should have as its main objective the well-being of children. The needs of the child should be the primary determinant of the total service, with full recognition of the interdependent needs and interests of the birth parents and adoptive parents.

It should not be the main purpose of an adoption service to find children for families, and it should not be expected to provide help for many of the problems associated with childlessness. Medical, psychiatric, and casework services should be made available in the community for those whose needs cannot be met through adoption, and who may want such help.<sup>18</sup>

### C. DEPARTMENT'S RESPONSE TO WHEELER RULING

Although the Department could have appealed the Commission's Order for judicial review, it did not do so. The Department's response to the Wheeler ruling was two-fold:

- (1) The Department completely revised its adoption policies concerning distinctions based on age, marital status, and religious beliefs to comply with the ruling.
- (2) It ceased placing infants for adoption and began to use private agencies exclusively for infant placements.

The Department revised its rules and submitted them to the Commission for review. The rules were reviewed by an attorney for the Commission who recommended changes to more fully comply with the ruling. The rules were then finalized and filed with the Commission. The Commission determined that the revised rules were in compliance with the Commission's Order. In a letter dated March 15, 1990, the attorney for the Commission advised the Department that the Commission was closing its files on the case.

The Department ostensibly chose to quit providing adoption services for infants under 1 year of age. This is the official position of the Department today. The Department no longer accepts relinquishments of infants and refers birth parents of infants to private adoption agencies. However, it appears that on occasion, based on particular circumstances, the Department has provided adoption services involving infants, presumably within the confines of the ruling.

#### **D. EFFECT OF THE WHEELER RULING AND THE DEPARTMENT'S RESPONSE**

The ruling alone would have restricted the Department in its ability to effectively operate in the contemporary adoption environment by not allowing birth mothers to participate in the selection of adoptive parents. Department placements could have continued, but in a limited respect. However, the Department's decision to cease offering adoption services for infants under 1 year of age has compounded the effect of the ruling. Other than direct nonagency placements, adoptions are available only through the Department or through agencies licensed through the Department. Many of these private agencies operate under religious auspices that may dictate requirements that some prospective adoptive parents may not meet. The Department therefore serves a segment of society that would not otherwise be served by private adoption agencies. The effect of the Department's response, therefore, is to eliminate the choice of regulated adoption services for a certain segment of society. The response also has the effect not only of making it harder for those people to successfully adopt but also of reducing the potential opportunities for placements of infants in suitable homes.

The final effect of the Wheeler ruling and the Department's response to the ruling is to make it harder, not easier, for certain people to adopt children, to limit the number of homes available to children, and, ultimately, to encourage unregulated direct nonagency placements. Birth parents may be encouraged to place their infants through direct nonagency placements to avoid the constraints of the ruling. Under the ruling, a birth mother who places her child through the Department is denied the right to participate in the selection of the adoptive parents. That right is available under state law to a birth mother who chooses to place her child through a direct nonagency placement. Adoptive parents who may not meet the eligibility criteria of private agencies will be encouraged to seek direct nonagency placements, as well.

## E. RECOMMENDATIONS -- DEPARTMENT'S ROLE

The ruling and its effects do not promote public policy of nondiscrimination. The ruling's goal--to prohibit discrimination--is not achieved since birth parents can place their infants through direct nonagency placements, avoiding the limitations of the ruling. The best interests of the child are not served because the pool of suitable homes is limited and because unregulated, direct nonagency placements are encouraged. Therefore, it is the recommendation of this study, in accord with earlier recommendations, that adoption policies and laws in this state be changed to make the best interests of the child the paramount concern. It is recommended that the statutory laws be changed to allow age, marital status, and religious information to be considered by state and private adoption agencies in adoption proceedings in a nonarbitrary manner, as just three of many relevant factors to be considered in determining the best interests of the child.

It is the intent of this recommendation to encourage the Department to resume offering adoption services for infants. It is acknowledged that at this time the Department may still be some years off from performing all its family services functions to the desired level. The Department was recently the subject of a comprehensive review. In March 1990, the Governor began a 3-month intensive review of child and family services in Montana. In July, as part of that review, a 78-page document was prepared and presented to the Governor and his Human Services Subcabinet on ways to improve child and family services in Montana and to strengthen the Department. Although the report is very comprehensive, the subject of adoption services provided by the Department is barely mentioned in the report, other than a passing reference to its revised adoption policies and a reference to the need to develop and maintain a separate management information system that meets state and regional information needs and ensures the uniform reporting of foster care and adoption cases required by the federal government. (It is apparently a fact that at the present time, the Department does not have

access to demographic information on a number of children it has placed in foster care due to the lack of an adequate management information system.) The final report to the Governor from his Human Services Subcabinet does not specifically address adoption services at all. It appears that the Department faces a challenge to meet its mission of becoming a comprehensive children and family services agency. However, it is hoped that the Department will eventually resume providing infant adoption services and fulfill its function in adoption services in Montana. Staff drafted a bill to enact the recommendations made in this report. This bill appears as LC 307 in the appendix.



### III. OTHER ISSUES

During the course of this study, representatives of the Department and private adoption agencies brought to the staff's attention issues that relate to adoption procedures not addressed in the Wheeler case. Staff agreed to look at these issues and to consider drafting bills to address these issues.

These issues include:

- a 72-hour relinquishment period after birth
- in direct nonagency placements, a requirement of counseling for birth parents and adoptive parents and a requirement of a home study of adoptive parents (including adoption by relatives)
- a requirement that insurance policies cover adopted children from the time of placement in the adoptive home and cover preexisting conditions

Staff drafted bills to address the first two issues, based on bill draft requests that were received by the Council prior to the publication of this report. These drafts appear in the appendix as LC 308 and LC 309, respectively.

## NOTES

1. Standards for Adoption Service, revised edition, 1988, published by the Child Welfare League of America, Inc., Washington, D.C.
2. Adoption Factbook, 1989, published by the National Committee for Adoption, Washington, D.C.
3. Adoption Law and Practice, 1989, published by Matthew Bender & Company, Inc., Times Mirror Books, New York, New York.
4. Id.
5. Id., section 1.05[3].
6. See the advertisement found posted on a bulletin board in the Capitol in Helena in September 1990 and attached to this report as an exhibit. Staff has also frequently seen similar advertisements in the personal ads section of the Helena Independent Record during the course of this study.
7. Wheeler's Post-Trial Memorandum, p. 19.
8. Letter from Anne L. MacIntyre, Administrator of the Commission for Human Rights, to Leslie Taylor, Department Attorney, dated November 28, 1988.
9. Commission for Human Rights, Findings of Fact, Conclusions of Law and Final Order, dated October 17, 1988, Order No. 2, p. 50.
10. Id., No. 23, p. 14.
11. Adoption Law and Practice, section 13.01[1].
12. Order, No. 65, p. 39.
13. Id., No. 66, p. 39.
14. Id., No. 67, p. 39.
15. Id., No. 2, p. 50.
16. Id., No. 3, p. 50.
17. Adoption Law and Practice, section 3.06 [3].
18. Standards for Adoption Service, section 1.1.



## **APPENDIX A**



# Proposed Legislation

1 \*\*\* BILL NO. \*\*\*\*\* LC0307

2 INTRODUCED BY \*\*\*\*\*

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING  
5 THE BEST INTERESTS OF THE CHILD AS THE STANDARD IN  
6 ADOPTION PROCEEDINGS; ALLOWING THE DEPARTMENT OF  
7 FAMILY SERVICES AND LICENSED CHILD-PLACING AGENCIES  
8 TO CONSIDER AGE, MARITAL STATUS, AND RELIGION IN  
9 ADOPTION PROCEEDINGS; AMENDING THE LAWS RELATING TO  
10 DISCRIMINATION TO ALLOW THE NONARBITRARY  
11 CONSIDERATION IN ADOPTION PROCEEDINGS OF RELEVANT  
12 INFORMATION CONCERNING FACTORS THAT MIGHT OTHERWISE  
13 BE PROHIBITED; AMENDING SECTIONS 49-1-102, 49-2-308,  
14 49-3-204, AND 49-3-205, MCA; AND PROVIDING AN  
15 EFFECTIVE DATE."

16

17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF  
18 MONTANA:

19 NEW SECTION. Section 1. Adoption policy -- best  
20 interest of child standard -- factors to be  
21 considered. (1) It is the policy of the state of  
22 Montana to ensure that the best interests of the  
23 child are met by adoption proceedings.

24 (2) The primary purpose of adoption is to help  
25 a child become a permanent member of a nurturing

# Proposed Legislation

1 family that can give him the care, protection, and  
2 opportunities essential for his healthy personal  
3 growth and development.

4 (3) The well-being of the adopted child is the  
5 main objective in the placement of children for  
6 adoption. The needs of the child must be the primary  
7 focus of adoption proceedings, with full recognition  
8 of the interdependent needs and interests of birth  
9 parents and adoptive parents.

10 (4) All relevant factors must be considered in  
11 determining the best interests of the child in an  
12 adoption proceeding. Factors relevant to the  
13 determination of a prospective adoptive parent's  
14 parenting ability, the future security for a child,  
15 and familial stability must be considered. In  
16 determining the best interests of the child, the  
17 following factors with regard to a prospective  
18 adoptive parent may be considered:

19 (a) age, as it relates to health, earning  
20 capacity, provisions for the support of a child, or  
21 other relevant circumstance;

22 (b) marital status, as it relates to the ability  
23 to serve as a parent in particularized  
24 circumstances; and

25 (c) religion, as it relates to the ability to  
26 provide the child with an opportunity for religious

# Proposed Legislation

1 or spiritual and ethical development.

2 (5) For purposes of ensuring that the best  
3 interests of the child are met, the department and  
4 licensed child-placing agencies are authorized to  
5 gather and use, in an appropriate, nonarbitrary  
6 manner, information concerning the age, marital  
7 status, and religious beliefs of prospective  
8 adoptive parents. The authority granted by this  
9 subsection includes the authority to receive and to  
10 consider, consistent with the best interests of the  
11 child, the preferences of natural parents relating  
12 to the age, marital status, or religious beliefs of  
13 adoptive parents.

14 Section 2. Section 49-1-102, MCA, is amended to  
15 read:

16 "49-1-102. Freedom from discrimination. (1) The  
17 right to be free from discrimination because of  
18 race, creed, religion, color, sex, physical or  
19 mental handicap, age, or national origin is  
20 recognized as and declared to be a civil right. This  
21 right ~~shall~~ must include but not be limited to:

22 ~~(1)~~ (a) the right to obtain and hold employment  
23 without discrimination; and

24 ~~(2)~~ (b) the right to the full enjoyment of any of  
25 the accommodation facilities or privileges of any  
26 place of public resort, accommodation, assemblage,

# Proposed Legislation

1 or amusement.

2 (2) This section does not prevent the  
3 nonarbitrary consideration in adoption proceedings  
4 of relevant information concerning the factors  
5 listed in subsection (1)."

6 Section 3. Section 49-2-308, MCA, is amended to  
7 read:

8 "49-2-308. Discrimination by the state. (1) It  
9 is an unlawful discriminatory practice for the state  
10 or any of its political subdivisions:

11 ~~(1)~~(a) to refuse, withhold from, or deny to a  
12 person any local, state, or federal funds, services,  
13 goods, facilities, advantages, or privileges because  
14 of race, creed, religion, sex, marital status,  
15 color, age, physical or mental handicap, or national  
16 origin, unless based on reasonable grounds;

17 ~~(2)~~(b) to publish, circulate, issue, display,  
18 post, or mail a written or printed communication,  
19 notice, or advertisement which states or implies  
20 that any local, state, or federal funds, services,  
21 goods, facilities, advantages, or privileges of the  
22 office or agency will be refused, withheld from, or  
23 denied to a person of a certain race, creed,  
24 religion, sex, marital status, color, age, physical  
25 or mental handicap, or national origin or that the  
26 patronage of a person of a particular race, creed,

# Proposed Legislation

1 religion, sex, marital status, color, age, or  
2 national origin or possessing a physical or mental  
3 handicap is unwelcome or not desired or solicited,  
4 unless based on reasonable grounds;

5 ~~{3}~~(c) to refuse employment to a person, to bar  
6 him from employment, or to discriminate against him  
7 in compensation or in a term, condition, or  
8 privilege of employment because of his political  
9 beliefs. However, this prohibition does not apply to  
10 policymaking positions on the immediate staff of an  
11 elected officer of the executive branch provided for  
12 in Article VI, section 1, of the Montana  
13 constitution, to the appointment by the governor of  
14 a director of a principal department provided for in  
15 Article VI, section 7, of the Montana constitution,  
16 or to the immediate staff of the majority and  
17 minority leadership of the Montana legislature.

18 (2) This section does not prevent the  
19 nonarbitrary consideration in adoption proceedings  
20 of relevant information concerning the factors  
21 listed in subsection (1)."

22 Section 4. Section 49-3-204, MCA, is amended to  
23 read:

24 "49-3-204. Licensing. (1) A state or local  
25 governmental agency may not grant, deny, or revoke  
26 the license or charter of a person on the grounds of

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1 race, color, religion, creed, political ideas, sex,  
2 age, marital status, physical or mental handicap, or  
3 national origin. Each state or local governmental  
4 agency shall take such appropriate action in the  
5 exercise of its licensing or regulatory power as  
6 will assure equal treatment of all persons,  
7 eliminate discrimination, and enforce compliance  
8 with the policy of this chapter. This subsection  
9 does not prevent the department of family services  
10 from licensing a child-placing agency that gives  
11 nonarbitrary consideration in adoption proceedings  
12 to relevant information concerning the factors  
13 listed in this subsection.

14 (2) The state may not issue or renew a license  
15 under Title 16, chapter 4, to an applicant or  
16 licensee that excludes from its membership or from  
17 its goods, services, facilities, privileges, or  
18 advantages any individual on the grounds of race,  
19 color, religion, creed, political ideas, sex, age,  
20 marital status, physical or mental handicap, or  
21 national origin. This subsection does not apply to  
22 any lodge of a recognized national fraternal  
23 organization."

24 Section 5. Section 49-3-205, MCA, is amended to  
25 read:

26 **"49-3-205. Governmental services. (1) All**



# Proposed Legislation

1 services of every state or local governmental agency  
2 must be performed without discrimination based upon  
3 race, color, religion, creed, political ideas, sex,  
4 age, marital status, physical or mental handicap, or  
5 national origin.

6 (2) No state or local facility may be used in  
7 the furtherance of any discriminatory practice, nor  
8 may a state or local governmental agency become a  
9 party to an agreement, arrangement, or plan which  
10 has the effect of sanctioning discriminatory  
11 practices.

12 (3) Each state or local governmental agency  
13 shall analyze all of its operations to ascertain  
14 possible instances of noncompliance with the policy  
15 of this chapter and shall initiate comprehensive  
16 programs to remedy any defect found to exist.

17 (4) This section does not prevent the  
18 nonarbitrary consideration in adoption proceedings  
19 of relevant information concerning the factors  
20 listed in this section."

21 NEW SECTION. Section 6. Codification  
22 instruction. [Section 1] is intended to be codified  
23 as an integral part of Title 40, chapter 8, part 1,  
24 and the provisions of Title 40, chapter 8, part 1,  
25 apply to [section 1].

26 NEW SECTION. Section 7. Severability. If a part

# Proposed Legislation

1     of [this act] is invalid, all valid parts that are  
2     severable from the invalid part remain in effect. If  
3     a part of [this act] is invalid in one or more of  
4     its applications, the part remains in effect in all  
5     valid applications that are severable from the  
6     invalid applications.

7         NEW SECTION.   Section 8.   **Effective date.** [This  
8     act] is effective July 1, 1991.

9                                 -End-

# Proposed Legislation

1 \*\*\* BILL NO. \*\*\*\*\* LC0308

2 INTRODUCED BY \*\*\*\*\*

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING THE  
5 LAWS RELATING TO ADOPTIONS TO REQUIRE A 72-HOUR  
6 PERIOD AFTER BIRTH BEFORE A RELINQUISHMENT OF  
7 PARENTAL RIGHTS MAY BE EXECUTED; AMENDING SECTIONS  
8 40-6-125, 40-6-135, AND 40-8-109, MCA; AND PROVIDING  
9 AN EFFECTIVE DATE."

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF  
12 MONTANA:

13 Section 1. Section 40-6-125, MCA, is amended to  
14 read:

15 "40-6-125. Children born out of wedlock --  
16 relinquishment -- consent. (1) If the mother of a  
17 child born out of wedlock proposes to relinquish the  
18 child for adoption and the relinquishment or consent  
19 of the birth father cannot be obtained, the child  
20 may not be placed for adoption until the parental  
21 rights of the father are terminated by the court as  
22 provided in this part, by the court pursuant to  
23 Title 41, chapter 3, or by a court of competent  
24 jurisdiction in another state or country.

25 (2) Pending the termination or other disposition

# Proposed Legislation

1 of the rights of the father of the child born out of  
2 wedlock, the mother may execute a relinquishment, in  
3 accordance with 40-6-135(2) through (5), terminating  
4 her rights to the child. If the mother relinquishes  
5 the child, the agency of the state of Montana ~~or~~  
6 the, a licensed adoption agency, or the person to  
7 whom the child is relinquished may file a petition  
8 under this part or a petition of dependency or  
9 neglect pursuant to Title 41, chapter 3. Pending  
10 disposition of the petition, the court may enter an  
11 order authorizing temporary care of the child.

12 (3) At the request of the mother, her execution  
13 of a relinquishment ~~shall~~ must be delayed until  
14 after the court has determined the identity of the  
15 father and has awarded custody of the child to the  
16 father or terminated his rights under this part."

17 Section 2. Section 40-6-135, MCA, is amended to  
18 read:

19 "40-6-135. Relinquishment of parental rights --  
20 form, execution, and revocation. (1) ~~Any~~ A parent or  
21 guardian who proposes to relinquish custody of a  
22 child for purposes of placing the child for adoption  
23 may do so by executing a relinquishment by which all  
24 parental rights to the child are voluntarily  
25 relinquished to the department of family services  
26 ~~or, a licensed adoption agency, or the prospective~~

# Proposed Legislation

1    adoptive parents. A parent may not execute a  
2    relinquishment to the department or a licensed  
3    adoption agency unless the department or the agency  
4    has agreed to accept custody of the child until the  
5    child is adopted.

6        (2) A relinquishment may be executed at any  
7    time, except that a birth mother may not execute a  
8    relinquishment before the child is 72 hours old.

9        ~~(2)~~(3) Except as otherwise provided in this  
10    section, a relinquishment ~~shall~~ must be by a  
11    separate instrument executed before a notary public.

12       ~~(3)~~(4) If the person from whom a relinquishment  
13    is required is a member of any of the armed services  
14    or is in prison, the relinquishment may be executed  
15    and acknowledged before any person authorized by law  
16    to administer oaths.

17       ~~(4)~~(5) If the relinquishment is executed in  
18    another state or country, the court having  
19    jurisdiction over the adoption proceeding in this  
20    state shall determine whether the relinquishment was  
21    executed in accordance with the laws of that state  
22    or country and may not proceed unless it finds that  
23    the relinquishment was so executed.

24       ~~(5)~~(6) Upon the filing of a properly and  
25    voluntarily executed relinquishment of a child by a  
26    parent or guardian, the court shall immediately

# Proposed Legislation

1 issue an order terminating the rights of that parent  
2 or guardian to that child. If the rights of both  
3 parents, the surviving parent, or the guardian have  
4 been terminated and if the department of family  
5 services or a licensed adoption agency has agreed to  
6 accept custody of the child until the child is  
7 adopted, the court shall issue an order committing  
8 the child to the department or to the licensed  
9 adoption agency to which the relinquishment was  
10 given.

11 ~~(6)~~(7) Entry of an order terminating the rights  
12 of both parents pursuant to subsection ~~(5)~~ (6)  
13 terminates the jurisdiction of the district court  
14 over the child in any divorce or separate  
15 maintenance action.

16 ~~(7)~~(8) Upon petition of a person who executed a  
17 relinquishment and of the department of family  
18 services or the licensed adoption agency to which  
19 the child was relinquished, the court with which the  
20 relinquishment was filed may grant a hearing to  
21 consider whether the relinquishment should be  
22 revoked. A relinquishment may not be revoked if the  
23 child has been placed for adoption. A verbatim  
24 record of testimony related to the petition ~~shall~~  
25 must be made."

26 Section 3. Section 40-8-109, MCA, is amended to

# Proposed Legislation

1 read:

2 "40-8-109. Placement for adoption by parents.

3 (1) ~~No~~ A parent may not make a placement of a child  
4 for adoption with an individual who is not a  
5 stepparent or a member of the child's extended  
6 family unless the parent files with the district  
7 court for the county in which the prospective  
8 adoptive parent or the parent making the placement  
9 resides:

10 (a) a notice of parental placement; and

11 (b) a relinquishment of parental rights to the  
12 prospective adoptive parents executed voluntarily  
13 and in accordance with 40-6-135(2) through ~~(4)~~ (5).

14 (2) The notice of parental placement and the  
15 relinquishment ~~shall~~ must be filed prior to a  
16 parent's placement of the child with an individual  
17 who intends to adopt the child. The notice of  
18 parental placement ~~shall~~ must contain the following  
19 information:

20 (a) the name and address of each birth parent,  
21 if known, and if unknown, the steps taken to  
22 ascertain the whereabouts of the parent or parents;

23 (b) the name and address of each prospective  
24 adoptive parent;

25 (c) the name and address or expected date and  
26 place of birth of the child; and

# Proposed Legislation

1           (d) the name and address of counsel, guardian ad  
2 litem, or other representative, if any, for each of  
3 the parties in (a) through (c) of subsection (2).

4           (3) Upon receipt of a notice of parental  
5 placement and a relinquishment, the court shall  
6 require that the department examine the child and  
7 conduct interviews with the birth parents and  
8 prospective adoptive parents and report to the court  
9 within 30 days but not earlier than 5 days after the  
10 birth of the child. The report must state whether  
11 the following requirements for placement have been  
12 met:

13           (a) that the decision to place was voluntarily  
14 made by the birth parents;

15           (b) that the department has no temporary  
16 authority to investigate or provide protective  
17 services to the family under 41-3-402;

18           (c) that the birth parents or their  
19 representatives have provided the court with the  
20 report required by 40-8-136;

21           (d) that the prospective adoptive parents have  
22 been provided a medical and social history of the  
23 child and birth parents; and

24           (e) that the proposed placement is in the  
25 child's best interest.

26           (4) The department may contract with licensed



# Proposed Legislation

1 social workers and licensed child-placing agencies  
2 to conduct the investigations and prepare the report  
3 to the court ordered pursuant to subsection (3).

4 (5) The department may charge the prospective  
5 adoptive parents a fee, commensurate with costs, for  
6 the investigation and report.

7 (6) Within 45 days of filing of the notice of  
8 parental placement and the relinquishment, the court  
9 shall schedule a hearing to consider the proposed  
10 placement.

11 (7) (a) At least 5 days' notice of the time and  
12 place of the hearing must be given to the birth  
13 parents, the prospective adoptive parents, any named  
14 guardian ad litem, and the department.

15 (b) The hearing ~~shall be~~ is closed to all  
16 persons except those persons entitled to notice and  
17 their representatives or counsel.

18 (8) If the court finds that all requirements for  
19 placement have been met, the court may issue an  
20 order or schedule a hearing for the purpose of  
21 terminating parental rights and granting temporary  
22 custody to the prospective adoptive parents. The  
23 prospective adoptive parents ~~must~~ shall file their  
24 petition to adopt within 30 days of the order.

25 (9) If the court finds that all requirements for  
26 the adoptive placement have not been met, the court

## Proposed Legislation

1     may issue any order appropriate to protect the  
2     child."

3             NEW SECTION. Section 4. **Effective date.** [This  
4     act] is effective July 1, 1991.

5                             -End-

# Proposed Legislation

1 \*\*\* BILL NO. \*\*\*\*\* LC0309

2 INTRODUCED BY \*\*\*\*\*

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO  
5 PRIVATE, NONAGENCY ADOPTIONS; REQUIRING COUNSELING  
6 FOR THE BIRTH MOTHER IN AN ADOPTION BY A  
7 NONRELATIVE; REQUIRING A PREPLACEMENT INVESTIGATION  
8 OR HOME STUDY OF A NONRELATIVE, PROSPECTIVE ADOPTIVE  
9 PARENT AND HOME; DELETING THE REQUIREMENT THAT A  
10 PARENT RELINQUISH PARENTAL RIGHTS PRIOR TO PLACEMENT  
11 OF A CHILD IN A NONRELATIVE, PROSPECTIVE ADOPTIVE  
12 HOME; REQUIRING EXECUTION OF RELINQUISHMENT OF  
13 PARENTAL RIGHTS BY A BIRTH MOTHER IN AN ADOPTION BY  
14 A NONRELATIVE IN THE PRESENCE OF A DISTRICT COURT  
15 JUDGE AND THE PROSPECTIVE ADOPTIVE PARENTS;  
16 INCREASING THE MAXIMUM PENALTY FOR PAYING OR  
17 CHARGING EXCESSIVE ADOPTION PROCESS FEES FROM \$1,000  
18 TO \$10,000; REQUIRING NONRELATIVE ADOPTIVE PARENTS  
19 AND THEIR REPRESENTATIVES TO FILE A REPORT OF  
20 AGREEMENTS AND DISBURSEMENTS RELATED TO THE ADOPTION  
21 PROCESS; AMENDING SECTIONS 40-8-103, 40-8-109, 40-8-  
22 135, AND 40-8-136, MCA; AND PROVIDING AN EFFECTIVE  
23 DATE."

24

25 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF

# Proposed Legislation

1 MONTANA:

2 Section 1. Section 40-8-109, MCA, is amended to  
3 read:

4 "40-8-109. Placement for adoption by parents  
5 parent -- adoption by nonrelative -- requirements  
6 before relinquishment of parental rights. (1) ~~No A~~  
7 ~~parent may make a placement of who proposes to place~~  
8 a child for adoption with an individual who is not a  
9 the child's stepparent or a member of the child's  
10 extended family ~~unless the parent files shall file~~  
11 with the district court for the county in which the  
12 prospective adoptive parent or the parent making the  
13 placement resides:

14 (a) a notice of parental placement; and  
15 (b) a relinquishment of parental rights to the  
16 prospective adoptive parents, executed voluntarily  
17 and in accordance with ~~40-6-135(2) through (4)~~  
18 subsection (8); and

19 (c) the report of agreements and disbursements  
20 required under 40-8-136.

21 (2) ~~(a) The notice of parental placement and the~~  
22 ~~relinquishment shall be filed prior to a parent's~~  
23 ~~placement of the child with an individual who~~  
24 ~~intends to adopt the child.~~ The notice of parental  
25 placement ~~shall~~ must be signed by the parent making  
26 the placement and must contain the following

# Proposed Legislation

1 information:

2 ~~(a)(i)~~ the name and address of each birth  
3 parent, if known, and if unknown, the steps taken to  
4 ascertain the whereabouts of the parent or parents;

5 ~~(b)(ii)~~ the name and address of each prospective  
6 adoptive parent;

7 ~~(c)(iii)~~ the name and address or expected date  
8 and place of birth of the child; and

9 ~~(d)(iv)~~ the name and address of counsel, guardian  
10 ad litem, or other representative, if any, for each  
11 of the parties listed in ~~(a) through (c) of~~  
12 ~~subsection (2)~~ subsections (2)(a)(i) through  
13 (2)(a)(iii).

14 (b) The district court shall provide a copy of  
15 the notice to the parent making the placement.

16 (3) Upon receipt of a notice of parental  
17 placement ~~and a relinquishment~~, the court shall  
18 require ~~that the department examine the child and~~  
19 ~~conduct interviews with the birth parents and~~  
20 ~~prospective adoptive parents to conduct an~~  
21 investigation as required by 40-8-122 and report to  
22 the court within 30 days but not earlier than ~~5 days~~  
23 72 hours after the birth of the child. The report  
24 must state whether the following requirements for  
25 placement have been met:

26 (a) that the decision to place was voluntarily

# Proposed Legislation

1     made by the birth parents;

2           (b) that the department has no temporary  
3     authority to investigate or provide protective  
4     services to the family under 41-3-402;

5           (c) that the birth parents ~~or, prospective~~  
6     adoptive parents, and their representatives have  
7     provided the court with the report required by 40-8-  
8     136;

9           (d) that the prospective adoptive parents have  
10    been provided a medical and social history of the  
11    child and birth parents; ~~and~~

12          (e) that the requirements of [sections 2 and 3]  
13    have been met; and

14          ~~(e)-(f)~~ that the proposed placement is in the  
15    child's best interest.

16          (4) The department may contract with licensed  
17    social workers and licensed child-placing agencies  
18    to conduct the investigations and prepare the report  
19    to the court ordered pursuant to subsection (3).

20          (5) The department may charge the prospective  
21    adoptive parents a fee, commensurate with costs, for  
22    the investigation and report.

23          (6) Within 45 days of filing of the notice of  
24    parental placement ~~and the relinquishment and the~~  
25    report required by 40-8-136, the court shall  
26    schedule a hearing to consider the proposed adoptive

# Proposed Legislation

1 placement.

2 (7) (a) At least 5 days' notice of the time and  
3 place of the hearing must be given to the birth  
4 parents, the prospective adoptive parents, any named  
5 guardian ad litem, and the department.

6 (b) The hearing ~~shall be~~ is closed to all  
7 persons except those persons entitled to notice and  
8 their representatives or counsel.

9 (8) (a) A parent may not execute a  
10 relinquishment of parental rights to an individual  
11 who is not the child's stepparent or a member of the  
12 child's extended family until the following criteria  
13 have been met:

14 (i) not less than 72 hours has elapsed since the  
15 birth of the child, if the person relinquishing  
16 parental rights is the child's birth mother;

17 (ii) the investigation or home study required by  
18 [section 2] has been performed; and

19 (iii) the parent has received counseling in  
20 accordance with [section 3].

21 (b) A relinquishment of parental rights by a  
22 birth mother under subsection (8) must be executed  
23 in district court in the presence of the district  
24 court judge and the prospective adoptive parents. A  
25 relinquishment under subsection (8) by any person  
26 other than a birth mother may be executed before a

# Proposed Legislation

1     notary public. A relinquishment must comply with 40-  
2     6-135(3) and (4).

3             ~~(8)~~(9) If the court finds that all requirements  
4     for adoptive placement have been met, the court may  
5     issue an order or schedule a hearing for the purpose  
6     of terminating parental rights and granting  
7     temporary custody to the prospective adoptive  
8     parents or it may issue a final decree if a petition  
9     for adoption has been filed under 40-8-121. The  
10    prospective adoptive parents ~~must~~ shall file their  
11    petition to adopt within 30 days of the order.

12            ~~(9)~~(10) If the court finds that all requirements  
13    for the adoptive placement have not been met, the  
14    court may issue any order appropriate to protect the  
15    child.

16            (11) The court shall send a copy of the final  
17    determination made by the court under this section  
18    to the central office of the department."

19            NEW SECTION. Section 2. Placement for adoption  
20    by parent -- adoption by nonrelative -- preplacement  
21    investigation or home study required of prospective  
22    adoptive parent. (1) A prospective adoptive parent  
23    who wishes to adopt a child under 46-8-109 shall  
24    initiate the nonagency adoption process by  
25    requesting an investigation or home study by the  
26    department or a licensed child-placing agency.



# Proposed Legislation

1 During the investigation or home study process, the  
2 department or agency shall provide the prospective  
3 adoptive parent information regarding the nonagency  
4 adoption process and a copy of [section 3] and this  
5 section.

6 (2) The prospective adoptive parent and the home  
7 of the prospective adoptive parent must be studied  
8 and evaluated according to the department's or  
9 child-placing agency's standards for placement of a  
10 child.

11 (3) The department or child-placing agency that  
12 conducts the investigation or home study shall  
13 prepare a written report containing the results of  
14 the investigation or home study. The report must be  
15 attached to and made a part of the report required  
16 by 40-8-109(3).

17 NEW SECTION. Section 3. Placement for adoption  
18 by parent -- adoption by nonrelative -- birth mother  
19 counseling required. (1) In an adoption subject to  
20 46-8-109, counseling of the birth mother is  
21 required. Counseling must also be offered to the  
22 birth father, if he is known and available.

23 (2) Counseling must be done by a staff person  
24 from the department or a licensed child-placing  
25 agency designated to provide this type of  
26 counseling.

# Proposed Legislation

1           (3) Counseling must consist of:

2           (a) an explanation and consideration of  
3 alternatives to adoption that are available to birth  
4 parents to assist them in determining the best  
5 course of action;

6           (b) detailed information regarding the nonagency  
7 adoption process, including reviewing and providing  
8 a copy of [section 2] and this section;

9           (c) a thorough explanation and consideration of  
10 the legal and personal impact of terminating  
11 parental rights and of adoption; and

12           (d) the completion of birth parent social and  
13 medical history forms.

14           (4) The counselor shall prepare a written report  
15 containing a description of the topics covered and  
16 the results of the counseling, including his opinion  
17 indicating whether or not the birth parent  
18 understood all issues and was capable of informed  
19 consent. This report must be completed and filed  
20 with the court no later than the date the  
21 relinquishment of parental rights is executed.

22           (5) The counselor's report must be attached to  
23 and made a part of the report required by 40-8-  
24 109(3).

25           NEW SECTION. Section 4. Placement for adoption  
26 by parent -- adoption by relative -- requirements. A

# Proposed Legislation

1 parent may relinquish parental rights for the  
2 purposes of adoption of a child to the child's  
3 stepparent or a member of the child's extended  
4 family. The relinquishment must be executed  
5 voluntarily and in accordance with 40-6-135(2)  
6 through (4). The relinquishment may be executed at  
7 any time, except that a birth mother may not execute  
8 a relinquishment before the child is 72 hours old.

9 Section 5. Section 40-8-135, MCA, is amended to  
10 read:

11 "40-8-135. Adoption Placement for adoption by  
12 parent -- adoption by nonrelative -- fees --  
13 violation -- penalty. (1) Reasonable adoption fees  
14 may be ~~charged by the child's birth parent, birth~~  
15 ~~parents, or guardian~~ paid by the adoptive parent for  
16 the actual cost of services documented in the report  
17 required by 40-8-136 and approved by the court. The  
18 cost of services must relate to:

- 19 (a) a petition for adoption;  
20 (b) placement of a child;  
21 (c) medical care or services;  
22 (d) prenatal care;  
23 (e) foster care; ~~or~~  
24 (f) investigation or home study;  
25 (g) counseling; or  
26 ~~(f)(h)~~ (h) other reasonable costs.

# Proposed Legislation

1           (2) A person who knowingly offers, gives, agrees  
2 to give, solicits, accepts, or agrees to accept from  
3 another person anything of value greater than that  
4 allowed under subsection (1) commits the offense of  
5 paying or charging excessive adoption process fees.

6           (3) A person convicted of the offense of paying  
7 or charging excessive adoption process fees may be  
8 fined an amount not to exceed ~~\$1,000~~ \$10,000."

9           Section 6. Section 40-8-136, MCA, is amended to  
10 read:

11           "40-8-136. Report Placement for adoption by  
12 parent -- adoption by nonrelative -- report of  
13 agreements and disbursements. (1) Prior to a hearing  
14 under 40-8-109, the birth parents ~~or,~~ prospective  
15 adoptive parents, and their representatives shall  
16 file with the court a report of agreements and  
17 disbursements, and they shall serve a copy of the  
18 report on the central office of the department.

19           (2) The report must contain:

20           (a) all oral and written agreements between the  
21 parties that relate to the future conduct of a party  
22 with respect to the child. If an oral agreement is  
23 reported, the substance of the agreement must be  
24 contained in the report and a copy of the report  
25 must be served on each party to the oral agreement.  
26 Copies of all written agreements must be attached to

# Proposed Legislation

1 the report.

2 (b) a full accounting of all disbursements of  
3 anything of value made or agreed to be made by or on  
4 behalf of the identified adoptive parents in  
5 connection with proceedings under this chapter. This  
6 accounting must include any expenses related to:

7 (i) the birth of the child;

8 (ii) placement of the child with the identified  
9 adoptive parents, including an investigation or home  
10 study;

11 (iii) counseling or medical or hospital care  
12 received by the birth parent or child prior to or  
13 after the child's birth; and

14 (iv) services relating to the petition for  
15 adoption or the placement of the child that were  
16 received by or on behalf of a birth parent or any  
17 other person.

18 (c) a statement by each person furnishing  
19 information contained in the report, attesting to  
20 the correctness and truthfulness of the information  
21 furnished by that person."

22 Section 7. Section 40-8-103, MCA, is amended to  
23 read:

24 **"40-8-103. Definitions.** As used in this chapter,  
25 unless the context otherwise requires the following  
26 definitions apply:

# Proposed Legislation

1           (1) "Adoption" means the act of creating the  
2           legal relationship between parent and child when it  
3           does not exist genetically.

4           (2) "Adoptive parent" means an adult who has  
5           become the mother or father of a child through the  
6           legal process of adoption.

7           (3) "Agency" means a public or voluntary agency  
8           licensed by any jurisdiction within the United  
9           States and expressly empowered to place children as  
10          a preliminary to a possible adoption.

11          (4) "Birth parent" means the mother or father of  
12          genetic origin of a child but does not include a  
13          putative father of a child.

14          (5) "Child" means any person under 18 years of  
15          age.

16          (6) "Court" means a Montana district court or a  
17          tribal court of any Montana Indian reservation.

18          (7) "Department" means the department of family  
19          services, as established and provided for in 2-15-  
20          2401.

21          (8) "Extended family member" means an adult who  
22          is the child's grandparent, aunt or uncle, or  
23          brother or sister, ~~niece or nephew, or first cousin.~~

24          (9) "Home study" means the process of assisting  
25          the prospective adoptive parent or family to assess  
26          its own readiness to adopt and a determination by

# Proposed Legislation

1    the department or a licensed child-placing agency of  
2    the compliance of the parent or family and its  
3    residence with applicable standards.

4        ~~(9)~~(10) "Parent" means the birth or adoptive  
5    mother or the birth, adoptive, or legal father whose  
6    parental rights have not been terminated.

7        ~~(10)~~(11) "Placement for adoption" means the  
8    transfer of physical custody of a child with respect  
9    to whom all parental rights have been terminated and  
10   who is otherwise legally free for adoption to a  
11   person who intends to adopt the child.

12       ~~(11)~~(12) "Relinquishment" means the informed and  
13   voluntary release in writing of all parental rights  
14   with respect to a child by a parent to an agency or  
15   individual pursuant to 40-6-135, ~~or~~ 40-8-109, or  
16   [section 4], whichever is applicable."

17        NEW SECTION. Section 8.    **Codification**  
18   **instruction.** [Sections 2 through 4] are intended to  
19   be codified as an integral part of Title 40, chapter  
20   8, part 1, and the provisions of Title 40, chapter  
21   8, part 1, apply to [sections 2 through 4].

22        NEW SECTION. Section 9.    **Severability.** If a part  
23   of [this act] is invalid, all valid parts that are  
24   severable from the invalid part remain in effect. If  
25   a part of [this act] is invalid in one or more of  
26   its applications, the part remains in effect in all

# Proposed Legislation

1     valid applications that are severable from the  
2     invalid applications.

3             NEW SECTION.   Section 10.   **Effective date.** [This  
4     act] is effective July 1, 1991.

5                                 -End-



## APPENDIX B



# HUMAN RIGHTS COMMISSION



TED SCHWINDEN, GOVERNOR

1236 SIXTH AVENUE

STATE OF MONTANA

(406) 444-2884

P.O. BOX 1728  
HELENA, MONTANA 59624

November 28, 1988

NOV 29 1988

Leslie Taylor, Attorney  
Department of Family Services  
P.O. Box 8005  
Helena MT 59604

Subject: Case No. ReAMsRtGs85-2599, Wheeler v. Department  
of Family Services; your letters of November 2 and  
November 17, 1988

Dear Ms. Taylor:

The Commission staff may be willing to defer enforcement of the requirements in the Commission order concerning preparation of a new home study for the Wheelers. Prior to agreeing to do so, however, we request, in light of your letter of November 17, the Department give us some assurances that it will be in a position to comply with the requirements of the order should the Department be unable to terminate the parental rights of the child presently placed with the Wheelers through the fos-adopt program. If you will advise me that you will be in a position to complete a new home study in the unlikely event that something goes wrong with the current placement, we will agree not to enforce the requirement of a new home study at this time.

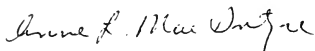
I appreciate the fact that the Department has decided not to seek judicial review of the Commission's order. I suggest, however, that the Department should seek a declaratory ruling from the Commission concerning the Department's licensing of private adoption agencies which use discriminatory criteria as factors in placement, particularly in light of the Department's decision to use private agencies exclusively for infant placements.

While the Commission elected not to address this issue in the Wheeler case, I believe it did so only because the Commissioners felt the issue was not properly before the Commission. My own view is that constitutional considerations would probably prohibit the state from interfering with religious organizations which wish to use religion as a factor in adoption placements. The issue with respect to age and marital status is less clear cut. Frankly, I think an argument still can be made that the Department should not

license private adoption agencies which deny placements based on age or marital status, or private non-religious agencies which utilize religion.

I bring this to your attention because I do not believe the Department's decision to discontinue arranging infant placements solves the problem of the use of discriminatory criteria in adoption placements. Please let me know if you have questions about the issue or about the procedures for seeking a declaratory ruling.

Sincerely,

A handwritten signature in cursive script, reading "Anne L. MacIntyre".

Anne L. MacIntyre  
Administrator

cc: Margery H. Brown  
Michael Meloy

AM0001

U.C.

# HUMAN RIGHTS COMMISSION



STAN STEPHENS, GOVERNOR

P.O. BOX 1728

STATE OF MONTANA

(406) 444-2884

HELENA, MONTANA 59624

March 15, 1990

Bob Mullen  
Director  
Dept. of Family Services  
48 North Last Chance Gulch  
Helena, Montana 59620

RECEIVED

MAR 17 1990

MONTANA LEGISLATIVE  
COUNCIL

Subject: Wheeler v. Dept. of Family Services  
Case No. ReAMsRtGs85-2599

Dear Mr. Mullen:

I am writing to inform you that our office is closing this case. We received your department's revised adoption manual on March 2. The Department has complied with the Commission's orders directing it to revise its adoption policies concerning distinctions based upon religious beliefs, age and marital status. Thank you for your staff's cooperation throughout this matter.

Sincerely,

A handwritten signature in cursive script, reading "David Fusoff".

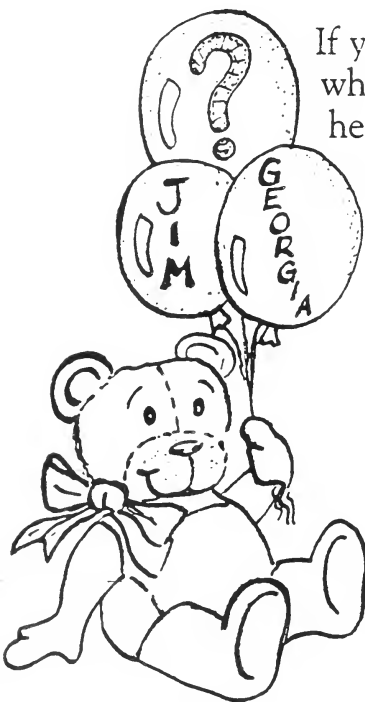
David Fusoff  
Staff Attorney

cc: Betty Bay, Program Bureau, Dept. of Family Services  
Valencia Lane, Legislative Council

DR

# We Want To Adopt A Baby

## Or Toddler Up To 3 Years Old!



If you're **pregnant** or know someone who may be considering adoption for her baby or know anyone who might be in a position to assist us, please give us or our attorney a call. **COLLECT.** Any assistance will be warmly received. All replies will remain confidential.

Thank You

**Jim & Georgia Drake**  
(408) 263-4331

**Marc Gradstein**  
Attorney at Law  
(800) 922-0777 (415) 585-9253

The Drakes  
(408) 263-4331  
Attorney  
Mark Gradstein  
(800) 922-0777  
(415) 585-9253

The Drakes  
(408) 263-4331  
Attorney  
Mark Gradstein  
(800) 922-0777  
(415) 585-9253

The Drakes  
(408) 263-4331  
Attorney  
Mark Gradstein  
(800) 922-0777  
(415) 585-9253

The Drakes  
(408) 263-4331  
Attorney  
Mark Gradstein  
(800) 922-0777  
(415) 585-9253



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